Supreme Court, U.S.
FILED

961754 MAY 2 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

REGINALD GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DEBORAH STANTON BURKE
325 South Main Avenue
San Antonio, Texas 78204
(210) 299-1137
Texas Bar No. 03387475
Counsel for Petitioner

May 1, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5 1PP

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE TRIAL COURTS ADMISSION INTO EVIDENCE OF COCONSPIRATORS TAPE RECORDED CONVERSATIONS OVER OBJECTION, WAS ERROR WHICH SUBSTANTIALLY INFLUENCED THE OUTCOME OF THE TRIAL.

LIST OF ALL INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

PETITIONER
Reginald E. Green

ATTORNEY FOR PETITIONER
Deborah Stanton Burke

CODEFENDANT- Claude Mormon	ATTORNEY, Ronald W. Lewis
CODEFENDANT- Ralph Green	ATTORNEY, Will R. Ford
CODEFENDANT- Horace Lee Colonel	ATTORNEY, Kent Smith

PLAINTIFF-APPELLEE
United States of America

ATTORNEY FOR THE PLAINTIFF-APPELLEE
Charles Spillers-Assistant U.S. Attorney
William C. Lamar-Assistant U.S. Attorney
John Alexander-Assistant U.S. Attorney

DEBORAH STANTON BURKE

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i
LIST OF INTERESTED PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
FEDERAL RULE INVOLVED 2
STATEMENT OF THE CASE 2
ARGUMENT 5
CONCLUSION 11
APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page(s)

CASES:

Chapman v. California, 368 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 9

Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) 10

Krulewitch v. United States, 336 U.S. 440 (1949) 7

United States v. Anderson, (8th Cir. 1981), *cert. denied*, 102 S.Ct. 978 (1981) 8

United States v. Behrens, 689 F.2d 154 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 573 (1982) 8

United States v. Bolla, 685 F.2d 929 (5th Cir. 1982) 8

United States v. Bourjaily, 107 S.Ct. 2775 (1987) 8

United States v. Brown, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978) 10

United States v. Cicale, 691 F.2d 95 (2nd Cir. 1982), *cert. denied*, 103 S.Ct. 1771 (1982) 9

United States v. Holloway, 740 F.2d 1373 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 440 (1984) 8

United States v. James, 590 F.2d 575 (5th Cir. 1979), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979) 5, 7

United States v. Jefferson, 925 F.2d 1242 (10th Cir. 1991) 10

United States v. McConnell, 988 F.2d 530 (5th Cir. 1993) 9

United States v. Miliet, 804 F.2d 853 (5th Cir. 1986) 6

TABLE OF AUTHORITIES – Continued

Page(s)

United States v. Molt, 772 F.2d 366 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1458 (1985) 8

United States v. Montes-Cardenas, 746 F.2d 771 (11th Cir. 1984) 9

United States v. Moody, 903 F.2d 321 (5th Cir. 1991) 9

United States v. Mouzin, 785 F.2d 682 (9th Cir. 1986) 8

United States v. Patterson, 644 F.2d 890 (1st Cir. 1981) 9

United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990) 11

STATUTES:

21 U.S.C. § 841 2

21 U.S.C. § 843 2

21 U.S.C. § 846 2

21 U.S.C. § 848 2

28 U.S.C. § 1254 1

OTHER AUTHORITIES:

Fed. R. Crim. P. 52 10

Fed. R. Evid. 801d(2)(E) 2, 6, 11

Sup. Ct. R. 10.1(c) 1

OPINIONS BELOW

The Petitioner, Reginald Green, respectfully prays that a WRIT OF CERTIORARI issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *United States of America v. Claude Mormon, Reginald E. Green, Horace Lee Colonel, Ralph Green also known as Chuck Green,* appeal number 95-60308. The opinion was rendered on December 31, 1996, which affirmed Petitioner's conviction in the United States District Court for the Northern District of Mississippi on March 15, 1995. The Opinion is unreported and is printed in the Appendix.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered final judgment in this case on December 31, 1996, affirming the judgment and sentence of the United States District Court for the Northern District of Mississippi. Petitioner's Motion for Rehearing was denied.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, and Supreme Court Rule 10.1(c) authorizing discretionary review by this Court on Writ of Certiorari when the United States Court of Appeals has decided an important question, a federal law which has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

FEDERAL RULE INVOLVED

Petitioner relies on the Federal Rules of Evidence, Rule 801(d)(2)(E), which provides in pertinent part as follows in:

> (d) Statements which are not hearsay. A statement is not hearsay if –
>
> . . . .
>
> (2) Admission by party opponent. The statement is offered against a party and is . . . , or
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Reginald E. Green, Petitioner, was indicted on January 28, 1994 by the Grand Jury in the United States District Court for the Northern District of Mississippi in an Eight-Count indictment. Ralph Green, Horace Lee Colonel and Claude Mormon were also charged as codefendants under the same indictment alleging a drug trafficking conspiracy in multiple states from March 1992 until November of 1993.

Count I charged all parties with conspiracy from March 1992 until November 1993 in the Northern District of Mississippi and elsewhere, to distribute, and to possess with intent to distribute in excess of 50 grams of cocaine base, a schedule II narcotic controlled substance in violation of 21 U.S.C. §§ 841 and 846. All defendants were found guilty under Count I.

Count II charged that Reginald E. Green from March of 1992 until November of 1993 in the Northern District of Mississippi and elsewhere, did intentionally and knowingly engage in a continuing criminal enterprise in that he did violate 21 U.S.C. § 848; in concert with at least five other persons with whom defendant occupied a position of organizer, supervisor and manager, such violations being the other counts in the indictment. Petitioner was found guilty of Count II and sentenced to 384 months imprisonment under Count II, only, on March 15, 1995, sentence was imposed on July 6, 1995. A copy of the judgment and sentence is included in the appendix.

Counts III, IV, V, VI, VII and VIII charged Reginald E. Green and Chuck Green with knowingly and intentionally using a telephone to facilitate a conspiracy to distribute cocaine base in violation of 21 U.S.C. § 843. Counts III through VIII were dismissed by the trial court upon defense motion. The trial court found that the government failed in its burden of proof to show that the statements on the tapes were made in furtherance of the conspiracy.

During trial, the government introduced evidence from other cooperating coconspirators, namely: Samuel Hall, Raymond Kinsey, Demarco Morgan, Raymond Rowe. All of the government witnesses implicated Petitioner and his co-defendants in an elaborate drug transportation and sales scheme extending from Texas to Florida and Mississippi. They told stories of driving and flying to Texas from Florida to pick up drugs from the Greens in San Antonio, Texas and then transporting the drugs back for sale, amounts and methods of payment,

prices obtained for drugs when sold, communication systems used when traveling, record keeping practices used by Reginald E. Green, vehicles used, houses used for overnight stay, businesses used for pick-up and payment. Demarco Morgan and Samuel Hall also admitted that they had agreed, a long time ago, that if they ever were arrested and charged with a drug trafficking crime that they would implicate someone other than their "true" supplier in order to protect themselves and their families.

During trial, taped telephone conversations between Demarco Morgan and Chuck Green and Reginald Green were admitted into evidence, over objection, and the jury was allowed to listen to the taped telephone conversations, and typed copies of the transcripts from the taped conversations were provided to aid the listening process.

These taped telephone conversations were also the basis for Counts III through VIII of the indictment, which were dismissed by the trial court as same were found not to have been made in the furtherance of nor to aid the conspiracy, as alleged.

After petitioner was sentenced on July 6, 1995 to 384 months imprisonment under Count II of the indictment, he was granted continued release on bond pending appeal. Petitioner timely filed a motion for new trial, which was denied on August 4, 1995. Thereafter, Petitioner filed his brief on appeal in the United States District Court of Appeals for the Fifth Circuit. The Judgment of the trial court was affirmed by written, but unpublished opinion of the Fifth Circuit Panel on December 31, 1996. Thereafter Petitioner filed a Petition for Rehearing which was denied on January 31, 1997. A stay

of mandate was granted until March 18, 1997. Petitioner's Petition for Writ of Certiorari is being timely filed on or before May 1, 1997.

ARGUMENT

Petitioner, Reginald E. Green, appeals the decision of the Fifth Circuit Court of Appeals in which they upheld the trial court's decision admitting into evidence the taped telephone conversations between government witness Demarco Morgan and Petitioner Reginald Green and co-defendant Ralph "Chuck" Green. The government witness, Demarco Morgan, was a cooperating co-conspirator, who testified against Petitioners in order to obtain a reduction in the sentence he had already received for drug conspiracy and weapons charges. The Government Agents testified that they enlisted Demarco Morgan to call the Petitioner and his brother, Ralph "Chuck" Green, and to just "talk" to them. There were no instructions to talk about drugs. The transcripts of the taped telephone conversations were provided over objection to the jury and they were allowed to hear the tape recorded conversations, which were government exhibits 11, 12, 13, 14, 15, 18, 19 and 20, over defense objections that they were inadmissible because they did not facilitate a conspiracy and therefore do not fit within the exception to the hearsay rule. The Court found that the government had met its burden under *James* for admissibility, but at the same time, the trial court ruled that the tape recorded conversations did not support the sufficiency standard for conviction on Counts III through VIII of the indictment. The court granted the Petitioners' Motion for Acquittal on

counts III through VIII at the close of the government's case in chief. In ruling the court said:

> "The court is of the opinion that these telephone conversations did not, nor were they ever intended to facilitate or make easier and make and to progress a conspiracy or a drug transaction. . . . It is possible they could have conducted a conversation to aid and facilitate the conspiracy, but they didn't do it. . . . These conversations are merely conversations in which Demarco Morgan wants money for his bond and gives some sort of status report about some of these other people, and the Fifth Circuit said very clearly in a fairly recent case, July 2, 1992, that that is not enough and there has to be something specifically to make the conspiracy easier to assist in carrying it along, and the court finds nothing in this, even looking in the light most favorable to the government, that would aid this conspiracy from these conversations." . . .
>
> "The court is finding as far as violating the telecommunication statute, they didn't meet that purpose, but they are admissible and the jury has been so instructed as evidence relevant to whether or not a conspiracy existed as between these defendants, something that the jury can consider in that regard."

In criminal prosecutions, the determination of admissibility of conspirators' statements pursuant to the Federal Rules of Evidence, Rule 801(d)(2)(E), is for the judge alone. *United States v. Miliet*, 804 F.2d 853 (5th Cir. 1986).

Petitioner suggests that the trial court's two decisions are in conflict, and are therefore erroneous. On the one

hand, the court found that the statements were admissible under *James*. Yet, in *United States v. James*, 590 F.2d 575, 583 (5th Cir. 1979), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), the standard of review for admissibility of co-conspirator's statements was clearly defined. The prosecution must show by a preponderance of the evidence that:

1) a conspiracy existed,

2) the co-conspirator and the defendant against whom the coconspirators' statement is offered are members of the conspiracy, and

3) the statement was made during the course of and in furtherance of the conspiracy.

This same standard was outlined in *Krulewitch v. United States*, 336 U.S. 440 (1949)

Petitioner does not understand how the preliminary admissibility standards of *James* can be met if at the same time there is an explicit finding by the trial court that the statements were not made in the course of or in furtherance of the conspiracy. Clearly, one of the three prongs of admissibility of co-conspirator's statements as an exception to the hearsay rule is missing on the facts of our case. The trial court erred in its ruling.

In order for co-conspirator's statement to be admissible under the Federal Rules of Evidence, Rule 801(d)(2)(E), co-conspirator's exception to the hearsay rule, the trial court must determine, based on substantial and independent evidence, that the conspiracy existed, and that the statement was made during the course and

in furtherance of the conspiracy. *United States v. Bolla,* 685 F.2d 929 (5th Cir.) 1982.

An act or statement in furtherance of the conspiracy has been a prerequisite for admissibility of co-conspirator statements in the following cases, representing decisions in all of the federal jurisdictions. These were checks cashed in furtherance of the conspiracy, *United States v. Holloway,* 740 F.2d 1373 (6th Cir. 1984), *cert. denied,* 105 S. Ct. 440 (1984). Statements themselves were made in furtherance of the conspiracy. *United States v. Bourjaily,* 107 S. Ct. 2775, 2778 (1987), where the wife inculpated the defendant and herself as participants. Statements were made concerning planning or review of drug ring's exploits and held admissible as an exception to the co-conspirator's hearsay rule in *United States v. Molt,* 772 F.2d 366 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1458 (1985).

Statements made, identifying defendant as source of two sales of drugs, fits requirement of statement made in furtherance of conspiracy within the meaning of the rule and therefore are admissible. *United States v. Anderson,* (8th Cir. 1981), *cert. denied,* 102 S. Ct. 978 (1981).

The statements must have been made in furtherance of the conspiracy in order to be admissible as an exception to the hearsay rule. *United States v. Mouzin,* 785 F.2d 682 (9th Cir. 1986). *United States v. Behrens,* 689 F.2d 154 (10th Cir. 1982), *cert. denied,* 103 S. Ct. 573 (1982).

Statements concerning scales purchased by brother and that defendant took care of brother and that scales were discovered by police at residence of defendant in which drugs were found was sufficient to show that statements were made during course of conspiracy and

that brothers' acts were in furtherance of conspiracy. *United States v. Montes-Cardenas,* 746 F.2d 771 (11th Cir. 1984).

The statements must be made in furtherance of the conspiracy in order to be admissible. *United States v. Patterson,* 644 F.2d 890 (1st Cir. 1981).

Statements to co-defendants concerning plans of when and where to meet source for drugs, defendant's presence at the specific times and places discussed, defendant's evasive driving when meeting with co-defendant and coded messages warning not to misshoot, qualify as statements which are in furtherance to the conspiracy and would be admissible against co-defendant. *United States v. Cicale,* 691 F.2d 95 (2nd Cir. 1982), *cert. denied,* 103 S. Ct. 1771 (1982).

The admission and exclusion of evidence by a trial court is reviewed for error by an abuse of discretion standard. *United States v. Moody,* 903 F.2d 321 (5th Cir. 1991). *United States v. McConnell,* 988 F.2d 530 (5th Cir. 1993).

If this court should agree that the district court erred and abused its discretion in admitting into evidence, the tape recorded conversations in this case over objection, then the next step in our analysis is to determine whether the error was harmless. The standard of review for constitutional error was established in *Chapman v. California,* 368 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L.Ed.2d 705 (1967). In *Chapman,* this Court held that when confronted with a constitutional error, a reviewing court can find the error harmless only if it is convinced that the error was harmless beyond a reasonable doubt. Petitioner suggests that

the court's failure to exclude the hearsay statements of the co-defendants in this case amounted to plain error under the confrontation clause of the United States Constitution. In order to find plain error under the confrontation clause, the district court's error in failing to exclude evidence must have been both obvious and substantial. *United States v. Brown,* 555 F.2d 407, 420 (5th Cir. 1977), *cert. denied,* 435 U.S. 904, 98 S. Ct. 1448, 55 L.Ed.2d 494 (1978). In *Idaho v. Wright,* ___ U.S. ___, 110 S. CT. 3139, 111 L.Ed.2d 638 (1990), this Court articulated a two prong test to determine whether the introduction of hearsay statements violated an accused's constitutional right to confrontation: (1) The Confrontation Clause is not violated if the hearsay statement "falls within a firmly rooted hearsay exception;" and (2) even if it does not fall within such an exception, hearsay testimony is not violative of the Confrontation Clause if it is supported by a showing of particularized guarantees of trustworthiness."

We are confident that neither prong of *Idaho v. Wright* applies to the facts of this case.

If this Court however, does not agree that it was plain error for the district court to refuse to exclude the hearsay testimony of co-defendants under the Confrontation Clause, then we ask this Court to apply the non-constitutional standard of review to the facts of this case as outlined in *United States v. Jefferson,* 925 F.2d 1242 (10th Cir. 1991). Under Rule 52 of the Federal Rules of Criminal Procedure, any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. A harmless non-constitutional error is one that did not have a "substantial influence" on the outcome of the trial nor does it "leave one in 'grave doubt' as to

whether it had such effect." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990).

After careful analysis in this case, Petitioner is confident that this Court will find that the trial court's error in allowing admission into evidence of the hearsay statements of codefendants that were not made in furtherance of the conspiracy and therefore did not fall into the co-conspirator's exception to the hearsay rule had a grave and substantial influence on the outcome of this trial and there is no doubt that it did so.

CONCLUSION

The trial court erred in admitting into evidence over objection the tape recorded telephone conversations of co-conspirators in this case as such statements were hearsay, and did not fall within the exception to the hearsay rule found in the Federal Rules of Evidence, 801(d)(2)(E), as one of the requisites is that the statement must have been made in furtherance of the conspiracy in order to be admissible as an exception to the rule. The statements admitted were not in furtherance of the conspiracy; they were not admissible; the defendants suffered harm from such admission. Petitioner is entitled to a new trial.

Respectfully submitted,

DEBORAH STANTON BURKE
325 South Main Street
San Antonio, Texas 78204
(210) 299-1137

Counsel for Petitioner

PETITIONER

REGINALD E. GREEN

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-60308

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CLAUDE MORMON; REGINALD E. GREEN; HORACE LEE COLONEL; RALPH GREEN also known as CHUCK GREEN,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Mississippi

(1:94-CR-001)

(Filed Dec. 31, 1996)

Before REYNALDO G. GARZA, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Appellants/Defendants Claude Mormon, Reginald E. Green, Horace Lee Colonel, and Ralph Green, also known as Chuck Green, were convicted by a jury of conspiracy

---

* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

to distribute and to possess with intent to distribute in excess of 50 grams of cocaine base between March 1992 and November 1993, in violation of 21 U.S.C. §§ 841 and 846. Reginald Green was also convicted of unlawfully engaging in a continuing criminal enterprise during the same period, in violation of 21 U.S.C. § 848.

Claude Mormon was sentenced to 339 months imprisonment followed by five years of supervised release. He was fined $1,000 and charged an assessment of $50. Reginald E. Green was sentenced to 384 months imprisonment followed by five years of supervised release. He was fined $50,000 and charged an assessment of $50. Horace Lee Colonel was sentenced to 240 months imprisonment followed by five years of supervised release. He was fined $1,500 and charged an assessment of $100. Ralph Green was sentenced to 292 months imprisonment followed by five years of supervised release. He was fined $1,000 and charged an assessment of $50. On appeal. Appellants raise multiple points of error. For the following reasons, the convictions and sentences of Appellants are affirmed.

BACKGROUND

Reginald Green ran a narcotics distribution operation based in San Antonio, Texas. Green's brother, Ralph Green, a/k/a Chuck Green, worked in Reginald's liquor store in San Antonio and assisted Reginald by distributing crack cocaine ("crack") and accepting drug proceeds for Reginald. Horace Colonel distributed crack supplied by the Greens in Florida and North Carolina through street dealers who worked for him. Claude Mormon was

employed by Colonel and other co-conspirators to transport supplies of crack from Texas to Florida and other locations.

Reginald Green ran this operation from March 1992 to November 1993. In short, Reginald would "front" crack cocaine to various individuals and those individuals would distribute the drug and return the profits to Reginald. Reginald would then resupply these distributors with more crack and await the profits. This cycle continued and eventually led to a pyramid of employees, all of whom worked for Reginald or one of the other named Appellants.

Eventually, some of the lower-level distributors were arrested and charged with federal drug and firearms violations. Individuals such as Demarco Morgan, Sam Hall, Raymond Rowe, and Raymond Kinsey, pleaded guilty to these charges and agreed to cooperate with law enforcement authorities with regard to apprehending the Appellants. Ultimately, search warrants were issued and Appellants were arrested.

On January 28, 1994, a federal grand jury in the Northern District of Mississippi returned an eight count indictment against Reginald Green, Ralph Green, Horace Colonel, and Claude Mormon. Count One charged all four Defendants with conspiracy to distribute and to possess with intent to distribute in excess of 50 grams of cocaine base between March 1992 and November 1993, in violation of 21 U.S.C. §§ 841 and 846. Count Two charged Reginald Green with unlawfully engaging in a continuing criminal enterprise during the same period, in violation of 21 U.S.C. § 848. Counts Three, Four, Five, Seven, and

Eight charged Ralph Green with use of a telephone to facilitate a conspiracy to distribute cocaine base, in violation of 21 U.S.C. § 843. Count Six charged Reginald Green with use of a telephone to facilitate a conspiracy to distribute cocaine base, in violation of 21 U.S.C. § 843.

Trial by jury began on March 6, 1995. At trial, government witnesses, including Morgan, Hall, Kinsey, and Rowe, each testified about their own participation in the conspiracy, as well as that of the Defendants. Upon the close of the government's case-in-chief, the district court granted Defendants' motions to dismiss Counts Three through Eight. The jury returned verdicts of guilty as to all Defendants on Count One, and as to Reginald Green on Count Two. Defendants now appeal.

DISCUSSION

Appellants raise several points of error. We will address each point of error in turn.[1]

---

[1] The appellate brief of each Defendant expressly adopts by reference the arguments presented in the briefs of his co-defendants. Rule 28(i) of the Federal Rules of Appellate Procedure provides for such adoption by reference in cases involving multiple appellants. We have previously held, however, that an appellant may not raise fact specific challenges to his own conviction or sentence – such as sufficiency-of-the-evidence challenges or challenges to the application of the sentencing guidelines – by merely referring to similar challenges in another appellants' brief. *United States v. Alix*, 86 F.3d 429, 434 n.2 (5th Cir. 1996), citing, *United States v. Harris*, 932 F.2d 1529, 1533 (5th Cir.), *cert. denied*, 112 S.Ct. 270, and *cert. denied*, 112 S.Ct. 324 (1991), and *cert. denied*, 112 S.Ct. 914 (1992). Accordingly, to the extent that the issues raised by each

1. Admission of Recorded Telephone Conversations

Defendants argue that the district court erred when it admitted into evidence certain post-arrest taped telephone conversations between Ralph Green, Reginald Green, and government witness Demarco Morgan. In these conversations, the parties discuss, *inter alia:* their likely sentences, their need to use "safe phones" or alternative communication methods to avoid government monitoring, and whether certain Defendants are "talking" to the government. Defendants argue that such statements are inadmissible hearsay because they do not constitute statements of a co-conspirator during the course and in furtherance of the conspiracy.[2]

For a statement to be admissible under this rule, "[t]here must be evidence that there was a conspiracy involving the declarant and the nonoffering [sic] party, and that the statement was made during the course and in furtherance of the conspiracy." *United States v. Fragoso,* 978 F.2d 896, 899 (5th Cir. 1992) (internal citations omitted) (citing, *Bourjaily v. United States,* 107 S.Ct. 2775, 2778 (1987)). Whether statements are admissible under this rule is a preliminary question that shall be determined by the court. FED. R. EVID. 104(a); *Fragoso,* 978 F.2d 899.

Defendant have been properly adopted by the other Defendants, our holding as to each issue may be deemed to be our holding as to all Defendants. *Alix,* 86 F.3d at 434 n.2.

[2] Rule 801(d) (2) (E) of the Federal Rules of Evidence states that a "statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator [sic] of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801 (d) (2) (E).

"When preliminary facts to admissibility of coconspirator [sic] testimony under Rule 801(d) (2) (E) are disputed, the offering party must prove them by a preponderance of the evidence." *Fragoso*, 978 F.2d at 899. Thus, the Government must establish by a preponderance of the evidence that the declarant and the defendant were involved in a conspiracy and that the statements were made during and in furtherance of the conspiracy. *Bourjaily v. United States*, 107 S.Ct. 2775, 2778-79 (1987). "[W]e accept all credibility choices that support the jury's verdict, letting jurors use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may reasonably be drawn from the evidence. . . . " *United States v. Steen*, 55 F.3d 1022, 1031 (5th Cir.), *cert. denied*, 116 S.Ct. 577 (1995) (internal citations omitted).

"[T]he failure to explicitly discuss drugs or drug-trafficking does not automatically indicate that the conversations were not in furtherance of the conspiracy. *United States v. Broussard*, 80 F.3d 1025, 1039 (5th Cir.), *cert. denied*, 177 S. Ct. 264 (1996). "Indeed, 'in furtherance of a conspiracy' is not to be construed too strictly lest the purpose of the exception be defeated." *Id.* "we have shunned an overly literal interpretation of this [phrase]." *Id.* (internal citations omitted).

"Given that concealment is often a necessary part of a conspiracy, statements made to aid the concealment are made in furtherance of the conspiracy." *Id.* A statement emphasizing the need to use 'safe' phones "clearly indicates" a desire that the conspiracy be kept concealed. *Id.* The alleged hearsay statements may be considered in making the Rule 801(d) (2) (E) determination. *Id.* at 2781.

Over the objections of Appellants, the district court conditionally admitted the taped telephone conversations. At the close of the government's case-in-chief, the district court determined that the government had satisfied its threshold burden of demonstrating, by a preponderance of the evidence, that a conspiracy existed.

We must interpret the evidence supporting the district court's determination in the light most favorable to the government. *United States v. Villareall*, 764 F.2d 1048, 1050 (5th Cir.), *cert. denied*, 106 S. Ct. 272 (1985). After granting such deference and after thoroughly reviewing the record, including the record citations made by both the government and the Appellants, we hold that the independent evidence offered by the government supports the trial court's determinations. Accordingly, out-of-court statements made by Ralph Green, Reginald Green, and Demarco Morgan were properly admitted into evidence.

2. *Constitutionality of Sentencing Guidelines*

Acknowledging that this Court has rejected similar arguments in the past,[3] Appellants, nevertheless, argue that their respective sentences violate their equal protection and due process rights, and constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. Specifically, Appellants argue that the Sentencing Guidelines unconstitutionally utilize

---

[3] This Court appreciates the candidness of Mormon's counsel in appropriately acknowledging unfavorable precedent.

a 100-1 sentencing ratio for those convicted of crimes involving crack cocaine versus powder cocaine. Appellants argue that the penalty scheme of U.S.S.G. § 2D1.1 disproportionately burdens African-Americans and that Congress enacted the scheme with the intent to discriminate on the basis of race. In support of their position, Appellants cite a recommendation by the United States Sentencing Commission to reduce or eliminate the sentencing disparity between cocaine and crack.[4] While Appellants acknowledge that this recommendation was ultimately rejected by Congress, Pub. Law 104-38, they argue that Congress' failure to adopt the Commission's recommendations evinces Congress' intent to discriminate against African-Americans.

We review the district court's legal conclusions *de novo*, and will uphold the district court's factual finding if it is supported by substantial evidence. *United States v. Cherry*, 50 F.3d 338, 342 (5th Cir. 1995).

---

[4] In 1994, Congress directed the Sentencing Commission to examine the federal sentencing scheme and to provide recommendations for retention or modification of the policy. The Sentencing Commission's report, transmitted to Congress on February 28, 1995, concludes that the 100 to one ratio is too great, and that the penalty scheme should be amended. The Commission took into account the "inescapable conclusion" that African-Americans comprise the largest percentage of those affected by the penalties associated with crack cocaine, and stated that, in the months ahead, it planned to refine the drug guidelines to account for the harms related to cocaine without the "difficulties associated with an automatic 100-to-1 ratio". U.S. Sentencing Commission, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY at xi, xv (1995). *United States v. Cherry*, 50 F.3d 338, 344 n.21 (5th Cir. 1995).

In *Cherry*, we noted that crack cocaine is a different drug from powder cocaine, and that Congress need not treat dissimilar drugs similarly. *Cherry*, 50 F.3d 338 at 344 (noting, *inter alia*, that crack cocaine is more addictive). We also held that Congress' choice to create disparate sentences for crack cocaine and powder cocaine:

> is rationally related to Congress's legitimate interest in protecting the general welfare. The 100 to one ratio is extreme, but it is not the province of this Court to second-guess Congress's chosen penalty. That is a discretionary legislative judgment for Congress and the Sentencing Commission to make. Our review is limited to whether the penalty has a rational basis. We conclude that it does. . . .

Cherry, 50 F.3d at 344. Accordingly, we find Defendants' arguments unpersuasive. No error was committed.

3. Failure to Strike Jurors 19 and 31.

Appellants argue that the district court erred when it failed to strike Jurors No. 19 and 31 for cause. Appellants contend that this error violated their Constitutional rights to due process and trial by an impartial jury. After reviewing the transcript of the proceedings, we find no error.

During voir dire, counsel for Reginald Green asked a series of questions concerning any potential biases which the potential jurors might have concerning the drug-related nature of the case and the race of the Defendants. Among the questions asked by counsel were: "Do any of you all right now have a perception that because this is a

drug offense that is being charged and because the defendants are African American that might insinuate guilt more so than if they were of another race?" and "So would anyone think that any of the four defendants would be more likely to be guilty of the charged offense because they are African Americans?" In response to these questions and others, Juror 19 stood and engaged counsel in the following dialogue:

> JUROR 19: How did you determine that they are African American:
>
> COUNSEL: Sir?
>
> JUROR 19: How did you determine that?
>
> COUNSEL: The defendants?
>
> JUROR 19: I am trying to make a point here. You have them stand up and we looked at them and you said African American. How did you determine that they are African American?
>
> COUNSEL: Let me think of a nice way to respond. I am familiar, of course, with Reginald Green because he is my client, so I know he is African American.
>
> JUROR 19: How do you know?
>
> COUNSEL: And his brother is Chuck Green, so I know he is African American.
>
> JUROR 19: How do you know?
>
> COUNSEL: I talked to the attorneys for Will Ford – for Claude Mormon and Horace Colonel and I know that they know that their clients are African American, so I know that is something in [sic] true in this case.

> JUROR 19: But that is pedigree, there is no way of proof.
>
> COUNSEL: Thank you, sir, for your comment.
>
> JUROR 19: My point is, we are just going by the way they look, right?
>
> COUNSEL: Yes, sir.
>
> JUROR 19: So they are American.
>
> COUNSEL: I am going – Sir, I don't want to argue with you, but I do want to say that I appreciate your comment. Thank you very much.

Based upon this exchange, counsel for Defendant Mormon sought to have Juror 19 excused for cause, arguing that the dialogue was "bizarre" and that Juror 19 was "hostile with regard to race." Determining that Juror 19's responses and demeanor did not indicate bias or prejudice, the district court held:

> [H]e obviously has a different perception or conception of the term African American than the way it was being asked about by [Counsel], but that in itself does not show he is a racist or has racial prejudice. When he responded to all of your questions about whether he would be prejudiced in any way because of race, he said no, so that challenge will be denied.[5]

---

[5] The transcript shows that Reginald Green's counsel did not directly ask Juror 19 if he would be prejudiced by Defendants' race. However, on voir dire, the jury pool was collectively asked, on several occasions, if any member maintained any prejudice against Defendants on the basis of their race. No potential juror, including Juror 19, responded in the affirmative.

"Voire dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." *Mu'min v. Virginia,* 111 S. Ct. 1899, 1908 (1991). "Because the obligation to empanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire." *Id.* at 1904. "Despite its importance, the adequacy of voir dire is not easily subject to appellate review." *Id.* "The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions." *Id.* at 1904. Ultimately, the trial court must determine whether the juror is to be believed when he says that he has not formed an opinion about the case. *Id.* at 1905.

We review a district court's ruling as to juror impartiality for abuse of discretion. *United States v. Mendoza-Burciaga,* 981 F.2d 192, 197-198 (5th Cir. 1992), *cert. denied,* 114 S. Ct. 356 (1993). In this case, the district court determined that Juror 19 did not possess a prejudice which would cause him to form an opinion about the case. The district court based its decision not only upon the content of the exchange between Juror 19 and counsel, but also upon Juror 19's demeanor, manner, and tone. After reviewing the record, we find no basis upon which we can conclude that the district court committed error as to Juror 19.

In the alternative, we hold that any error was harmless. Defendants exercised one of their preemptory challenges to remove Juror 19. Accordingly, Juror 19 did not serve on the jury. Nevertheless, Defendants argue that the district court's alleged error in not striking Juror 19 for cause resulted in Defendants needing to use one of their preemptory challenges to strike Juror 19, thereby effectively reducing by one the number of challenges available to Defendants. For the following reasons, Defendants' argument fails.

The standard by which we determine the impact of an increase or decrease in the number of a party's peremptory challenges as a result of a court's erroneous ruling on a challenge for cause is set forth in *United States v. Prati*, 861 F.2d 82, 87 (5th Cir. 1988). Citing the Supreme Court decision in *Ross v. Oklahoma*, 108 S. Ct. 2273 (1988), we made clear that the pertinent inquiry is whether the jurors who actually set were impartial as required by the Sixth Amendment. *Prati*, 861 F.2d at 87. We rejected the notion that the loss of a peremptory challenge constitutes a violation of a constitutional right to an impartial jury. Although peremptory challenges are a means to an end of achieving an impartial jury, peremptory challenges are not of constitutional dimension. Therefore, although the alleged improper removal of the venire member may have altered the ultimate composition of the panel, this is not a ground upon which the defendants' convictions can be reversed. *Prati*, 861 F.2d at 87.

Next, Defendants argue that the district court abused its discretion by refusing to strike Juror No. 31 for cause. Juror No. 31 stated that she had an uncle in law enforcement. When counsel for Reginald Green asked Juror 31 if

that relationship would effect her ability to be "a fair and impartial juror," Juror 31 responded, "No ma'am." Defendants offer no evidence to show that Juror 31 would be a partial or biased juror. In essence, Defendants invite this Court to hold that relatives of law enforcement officials are, *per se*, incapable of making fair determinations. We decline Defendants' invitation. Based upon the record before us, we hold that Defendants have not shown that the district court abused its discretion by refusing to strike Juror 31 for cause.

4. Double Jeopardy

On February 3, 1994, two vehicles owned by Reginald Green were seized by the government pursuant to a search warrant executed at Reginald Green's residence. On April 15, 1994, both vehicles were administratively forfeited to the government subsequent to a summary forfeiture proceeding. A *lis pendens* was filed with the deed records of Bexar County, San Antonio, Texas, attaching both the residence of Reginald Green, as well as, a piece of rental property which he owned. The *lis pendens* prohibits the sale or transfer of these properties pending the outcome of Reginald Greens' appeal before this Court.

Reginald Green moved the district court to dismiss the criminal charges against him on the grounds that the summary forfeiture of his vehicles, as well as the pending forfeiture of his real property, constitutes punishment for his crime. Reginald Green argues that the sentence which he received for his criminal conviction constitutes additional punishment in violation of the double jeopardy

clause of the Fifth and Eighth Amendments to the Constitution. We disagree.

The double jeopardy clause of the Fifth Amendment to the Constitution states that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . . " U.S. CONST. AMEND. V. Because double jeopardy raises a legal issue of constitutional dimensions, we review *de novo* the denial of a motion to dismiss on double jeopardy grounds. *United States v. Arreola-Ramos*, 60 F.3d 188, 191 (5th Cir. 1995). The Supreme Court has interpreted the Double Jeopardy Clause to shield citizens from both multiple prosecutions and multiple punishments for the same offense. *Id.* at 191-192. Thus, only when a civil forfeiture constitutes "punishment" can jeopardy attach. *Id.* at 192. In *Arreola-Ramos*, we held that,

> a summary forfeiture, by definition, can never serve as a jeopardy component of a double jeopardy motion. In summary forfeiture proceedings, there is no trial, there are no parties, and no one is punished. Absent a trial, a party, and a punishment, jeopardy can never attach. As Arreola did not appear and contest the forfeiture, he was never in jeopardy. Without former jeopardy, double jeopardy cannot arise. We agree with the district court: As Arreola failed to establish former jeopardy, he necessarily failed to establish even the possibility of double jeopardy.

Arreola-Ramos, 60 F.3d at 192-193. See also, *United States v. Morgan*, 84 F.3d 765, 767 (5th Cir. 1996) ("When a defendant fails to judicially contest a civil forfeiture action by filing a 'claim', the defendant is not subject to former

jeopardy in the forfeiture action, and therefore, by definition, the government's subsequent prosecution of the defendant does not constitute double jeopardy."). Additionally, an appellant has the burden of directing the court to all relevant evidence in support of his argument. See, *United States v. Gonzalez*, 76 F.3d 1339, 1342 (5th Cir. 1996). If he fails to provide the necessary record for review, we need not consider the issue on appeal. *Id.* at 1342.

Because Reginald Green fails to offer any evidence showing that he appeared and contested the forfeiture of his vehicles, he failed to establish former jeopardy. Having failed to establish former jeopardy, he cannot now claim double jeopardy. Furthermore, Reginald Green has failed to direct this Court to any record evidence in support of his argument that the *lis pendens* filed against his real properties constitutes a punishment. For these reasons, we hold that Reginald Green has not shown that the district court erred in denying his motion to dismiss the criminal charges and sentence based upon double jeopardy. No error was committed.

5. Validity of Search Warrant

Reginald Green argues that the district court erred in not granting his motion to suppress evidence obtained from a search of his home because, he argues, the search warrants were overly broad and failed to specify with particularity the items to be searched.

The Fourth Amendment prohibits the issuance of general warrants which allow officials to burrow through a person's possessions looking for any evidence of a

crime. *United States v. Kimbrough*, 69 F.3d 723, 727 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1547 (1996), citing, *Andresen v. Maryland*, 96 S. Ct. 2737, 2748 (1976). A warrant must particularly describe the place to be searched and the person or things to be seized. *Id.; United States v. Layne*, 43 F.3d 127, 132 (5th Cir.), *cert. denied*, 115 S. Ct. 1722 (1995). In testing whether a specific warrant meets the particularity requirement, a court must ask whether an executing officer reading the description in the warrant would *reasonably* know what items are to be seized. *Kimbrough*, 69 F.3d at 727. "In identifying the property to be seized, the agents are required to interpret the warrant, but are not obliged to interpret it narrowly." *United States v. Hill*, 19 F.3d 984, 987 (5th Cir.) (internal citations omitted), *cert. denied*, 115 S. Ct. 320 (1994). This test for particularity may be made with supporting affidavits if the warrant expressly refers to the affidavits. *Layne*, 43 F.3d at 132. In circumstances where detailed particularity is impossible, generic language is permissible if it particularizes the types of items to be seized. *Kimbrough*, 69 F.3d at 727. The ultimate determination of reasonableness of the search is a conclusion of law which is reviewed *de novo*. *United States v. Capote-Capote*, 946 F.2d 1100, 1102 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2278 (1992).

Several search warrants were issued which collectively authorized a search of the following locations:

> 1. The residence of REGINALD GREEN, a dwelling house at 8848 Willmon, San Antonio, Texas;
>
> 2. The business of REGINALD GREEN, CRESTWAY LIQUOR STORE, 5121 Crestway Drive, San Antonio, Texas;

3. The house and premises located at 1203 Hays Street, San Antonio, Texas.

4. A 1990 Nissan Pathfinder registered to Reginald Green bearing Texas License CPY9OL, VIN: JN8HD17YXLW234841.

5. A 1987 Mercedes Benz registered to Reginald Green bearing Texas License 877RWW, VIN: WDBEA30D6HA570225.

Each search warrant referenced a 25-page affidavit by Federal Drug Enforcement Agency Special Agent Morgan Thompson, which described the items to be searched as follows:

(1) Controlled Substances, including cocaine, as well as materials and paraphernalia used in the weighing, cutting (diluting), packaging, concealing and distributing controlled substances, including cocaine;

(2) Books, records, receipts, notes, ledgers, bank records, money orders, and/or papers relating to, the transportation, importation, sale, and/or distribution of controlled substances, including cocaine, and/or records relating to the receipt and/or disposition of the proceeds from the transportation, importation, sale, and/or distribution of controlled substances, including cocaine;

(3) Currency, financial instruments, precious metals, and/or other proceeds of the transportation, importation, sale, and/or distribution of controlled substances, including cocaine, and records related to the laundering, secreting and/or distribution of monies related to illegal cocaine trafficking activities;

> (4) Telephone and address books, telephone toll records, or papers which reflect names, addresses and/or telephone numbers of individuals associated in the illegal transportation, importation, sale, and/or distribution of controlled substances, including cocaine;
>
> (5) Firearms and ammunition; and
>
> (6) Documents reflecting dominion and control of properties used to illegally distribute, transport, store, and conceal illegal controlled substances and the proceeds of the transportation, importation, sale, and or distribution of controlled substances, including cocaine.

Reginald Green argues that this language was unconstitutionally overbroad such as to "authorize [the government] to seize what they wished rather than requiring them to reasonably ascertain and identify the items authorized to be seized." We disagree. The language in the warrants, as described through the affidavit, properly limited the executing officers' discretion; an executing officer reading the description in the warrant would reasonably know what items were to be seized. Accordingly, we find this contention to be without merit.

6. Sufficiency of the Evidence

The following issues constitute challenges based upon the sufficiency of the evidence. First, Morman argues that the evidence does not support the district court's refusal to grant him a "minor participant" two-level reduction in the sentencing offense level. "[A] minor participant means any participant who is less culpable than most other participants, but whose role could not be

described as minimal." *United States v. Gaytan*, 74 F.3d 545, 561 (5th Cir. 1996); U.S.S.G. § 3B1.2(b), comment (n.3). "[A] district court should not make an adjustment for minor participation merely because the defendant's participation is somewhat less than the other participants'; to warrant such a downward adjustment, the defendant's participation must be enough less so that he at best was peripheral to the advancement of the illicit activity." *United States v. Castillo*, 77 F.3d 1480, 1494 (5th Cir.), *cert. denied*, 117 S. Ct. 180 (1996). "The defendant bears the burden of proving that his role in the offense was minor." *United States v. Atanda*, 60 F.3d 196, 198 (5th Cir. 1995).

We review the district court's application and legal interpretation of the sentencing guidelines *de novo*, *United States v. Domino*, 62 F.3d 716, 719 (5th Cir. 1995), and its findings of fact for clear error. *United States v. Hooker*, 997 F.2d 67, 75 (5th Cir. 1993). "A factual finding is not clearly erroneous as long as the finding is plausible in the light of the record as a whole." *United States v. Edwards*, 65 F.3d 430, 432 (5th Cir. 1995). After reviewing the record, we find plausible the district court's refusal to find that Morman was a minor participant. Accordingly, the district court committed no clear error.

Second, all Appellants argue that the evidence does not support the district court's application of a two-level increase in their respective sentencing offense levels for possession of a firearm. "The sentencing guidelines direct a sentencing court to increase the defendant's sentence by two levels whenever, in a crime involving the manufacture, import, export, trafficking, or possession of drugs, the defendant possessed a dangerous weapon." *United*

States v. Flucas, 99 F.3d 177, 179 (5th Cir. 1996); see, U.S.S.G. § 2D1.1(b) (1). "Application Note 3 to § 2D1.1 explains that this enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."[6] *Flucas*, 99 F.3d at 179; and see *United States v. Mitchell*, 31 F.3d 271, 277 (5th Cir.), *cert. denied*, 115 S. Ct. 455 (1995). "The burden of proof in this respect is on the government under a preponderance of the evidence standard." *United States v. Sparks*, 2 F.3d 574, 587 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 720, *cert. denied*, 114 S. Ct. 899, *cert. denied*, 114 S. Ct. 1548 (1994). "The Government may satisfy its burden of proving a connection between the weapon and the offense by showing that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred." *Flucas*, 99 F.3d at 179.

> Neither the sentencing guidelines nor the case law requires that the Government prove a defendant had knowledge of a weapon's existence. The adjustment must be made when a weapon is found at the scene of the crime unless there is clear improbability that the weapon is connected to the offense.

---

[6] In *Bailey v. United States*, 116 S. Ct. 501 (1995), the Supreme Court, construing 18 U.S.C. § 924(c) (1), held that the term "use" (of a weapon) requires the "active employment" of the weapon by the defendant. *Id.* at 505. Our Circuit has already held that *Bailey* does not apply to § 2D1.1 enhancements. *United States v. Castillo*, 77 F.3d 1480, 1499 n.34 (5th Cir. 1996).

Flucas, 99 F.3d at 179. "[S]entencing courts [in drug cases] may ordinarily infer that a defendant should have foreseen a co-defendant's possession of a dangerous weapon, such as a firearm, if the government demonstrates that another participant knowingly possessed the weapon while he and the defendant committed the offense." *Sparks*, 2 F.3d at 587, citing, *United States v. Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990). The district court's determination that a weapon was present and that its possession by a co-conspirator was foreseeable is a factual finding reviewable for clear error.

In the instant case, it is undisputed that Demarco Morgan, Samuel Hall, and Raymond Kinsey pled guilty to carrying a firearm during, and in relation to, a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Morgan, Hall, and Kinsey were each involved in the conspiracy. The district court did not clearly err in finding that Morgan, Hall, and Kinseys' possession of a firearm was reasonably foreseeable to the other defendants as co-conspirators.

Finally, Ralph Green argues that the evidence does not support the district court's refusal to grant his motion to acquit. Specifically, Ralph Green summarily asserts that the government did not prove, beyond a reasonable doubt, that he was involved in a conspiracy because he claims that the government's witnesses were incredible, unreliable, and their testimonies uncorroborated. He asserts that many of the witnesses were drug dealers whose testimonies were "substantially impeached by 'deals' with the government."

In a sufficiency review, we must determine whether viewing the evidence and the inferences therefrom in a light most favorable to the jury's guilty verdicts, a rational trier of fact could have found these defendants guilty beyond a reasonable doubt. *United States v. Payne*, 99 F.3d 1273, 1278 (5th Cir. 1996). In denying Ralph Green's motion for acquittal, the district court passed on the sufficiency of the evidence. We review the denial of the motion for acquittal *de novo*, applying the same standards as in a general sufficiency review. *Payne*, 99 F.3d at 1278; *United States v. Sanchez*, 961 F.2d 1169, 1179 (5th Cir.), *cert. denied*, 113 S. Ct. 330 (1992).

The elements of a drug conspiracy are: "(1) the existence of an agreement between two or more persons to violate narcotics law; (2) the defendant's knowledge of the agreement; and (3) the defendant's voluntary participation in the agreement." *Payne*, 99 F.3d at 1278; *United States v. Gonzalez*, 76 F.3d 1339, 1346 (5th Cir. 1996). "A jury may infer the elements of a conspiracy conviction from circumstantial evidence: an agreement to violate narcotics law may be inferred from concert of action. Knowledge of the conspiracy may be inferred from a collection of circumstances." *Payne*, 99 F.3d at 1278; *United States v. Leal*, 74 F.3d 600, 606 (5th Cir. 1996) (internal quotations and citations omitted).

We have previously held that "non-credibility is generally not a sound basis for alleging insufficiency of the evidence; it is the jury's function to determine credibility." *Payne*, 99 F.3d at 1278; *United States v. Polk*, 56 F.3d 613, 620 (5th Cir. 1995). We have also held that, unless the testimony is incredible or insubstantial on its face, a guilty verdict may be supported by only the

uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain of promise of leniency. *Payne*, 99 F.3d at 1278; *United States v. Bermea*, 30 F.3d 1539, 1552 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1825 (1995). Ralph Green has pointed to no evidence in the record showing that the testimony in this case is incredible or insubstantial on its face, nor do we find any upon our own review. Accordingly, there is sufficient evidence to support the conspiracy conviction of Ralph Green. The district court did not commit error.

7. Fast Food Receipt

Defendants argue that the district court erred in admitting into evidence two government exhibits, namely: (1) a fast food receipt from a San Antonio restaurant which law enforcement officials found within Mormon's possession when he was arrested (Exhibit 68A), and (2) an enlarged photocopy of that receipt (Exhibit 68B). This evidence was important to the government's case because it placed Mormon in San Antonio (where the drug conspiracy was based) on the evening before his arrest. Defendants argue that the district court should not have admitted this evidence because it was never effectively disclosed to the Defendants by the government. While Defendants acknowledge that they were given an opportunity to generally review the government's documents, they argue that their opportunity to do so was hollow because the government neither specified the contents of Exhibits 68(A) and (B) on its disclosure list, nor indicated its significance. For the following reasons, we find no error.

During the discovery process, the government voluntarily complied with FED. R. CRIM. P. 16(a)[7] and specifically listed, *inter alia*, items that the government intended to introduce at trial. Among the descriptions of the items disclosed was the following: "miscellaneous notes and papers found as the result of an August 17, 1993 traffic stop of Mormon." It is not disputed that all of the disclosed documents were made available to Defendants who reviewed them at the office of the United States Attorney.

The narrow issue presented for review is whether the government substantially complied with the discovery requirements of the Federal Rules of Criminal Procedure. *United States v. Elam*, 678 F.2d 1234, 1252 (5th Cir. 1982). "Rule 16, FED.R.CRIM.P., does not require that the prosecution disclose all the minutiae of its evidence, it does not require revelation of trial strategy; nor does the Rule require delineation of the government's case with total specificity." *Id.* The admission of evidence which has not been properly identified in any pretrial order or other procedure is largely a matter for the sound discretion of the trial judge. *Id.*, citing, *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980).

Under the circumstances of this case, where the government's exhibit list included a general reference to all

---

[7] In relevant part, Rule 16(a) requires the government, upon defendant's request, to disclose to defendant and make available for inspection, copying, or photographing any relevant written or recorded statements made by the defendant which is within the possession, custody, or control of the government. FED. R. CRIM. P. 16(a).

of the disputed records, and those records were made available to the defense, the district court did not abuse its discretion in admitting those records into evidence. *Elam*, 678 F.2d at 1253. We find no error.

8. Jury Instructions

Appellants argue that the district court abused its discretion when it refused to grant Appellants' proposed jury instructions concerning a government witness' immunity, credibility, and alleged drug addiction. The district court held that the issues of immunity and credibility were already addressed in the charge, and that the evidence did not support an instruction concerning a witness' alleged drug addiction.

The trial court has broad discretion in formulating its charge, so long as the charge accurately reflects the law and facts of the case. *United States v. Allred*, 867 F.2d 856, 868 (5th Cir. 1989). A defendant is entitled to a correctly stated instruction, but not to his own particular language. *United States v. Davis*, 61 F.3d 291, 304-05 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 961 (1996). "[A] district court may properly decline to give a requested instruction which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions. *Allred*, 867 F.2d at 868 (citations omitted). The defendant must show that the district court's instruction failed to correctly state the law. *Davis*, 61 F.3d at 304.

Having reviewed the district court's jury charge, we find that it was an adequate statement of the law. The district court's refusal to give the requested instructions was not in error.

CONCLUSION

For the aforementioned reasons, the judgment of the district court is, in all respects, AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN District of MISSISSIPPI

UNITED STATES OF AMERICA

v.

REGINALD E. GREEN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
1:94CR000001-001

(Filed Jul. 14, 1995)

DEBORAH STANTON BURKE
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which (was)(were) accepted by the court.

[X] was found guilty on count(s) 1 & 2 after a plea of not guilty. The Court sentenced only on Count 2 this date.

Title & Section
21 U.S.C. 841&846

21 USC 848

Nature of Offense
Conspiracy to Distribute in Excess of 50 Grams of Cocaine Base.

Continuing Criminal Enterprise

Date Offense Concluded
04/1994

04/1994

Count Numbers
1

2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____.

[X] Count(s) 6 (is)(are) dismissed on the motion of the ~~United States~~ of defendant and sustained by the COURT.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 449-29-2825

Defendant's Date of Birth: 07/29/1960

Defendant's USM No.: 63828-080

07/06/1995
Date of Imposition of Judgment

/s/ Neal B. Biggers
Signature of Judicial Officer

Defendant's Mailing Address:
8848 Willmon Way
San Antonio, TX 78239

Defendant's Residence Address:

Same

Neal B. Biggers, Jr.
U.S. District Judge
Name & Title of Judicial Officer

July 13, 1995
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 384 Months on Count 2.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

[ ] at ____ a.m./p.m. on ____.

[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[X] before 2 p.m. on 08/07/95.

[ ] as notified by the United States marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 Yrs., Ct. 2.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

[X] While on supervised release, the defendant shall not possess a firearm or destructive device. (Check if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution

that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

(SEE ADDITIONAL CONDITIONS ON BACK)

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled

substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Fine	Restitution
2	$50	$50,000	$0
Totals:	$50	$50,000	$0

FINE

The fine includes any costs of incarceration and/or supervision.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution	Priority Order of Payment
N/A		

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column above.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

[X] in full immediately.

[ ] in full not later than _____.

[ ] in ___ installments of $ _____ over a period of _____ to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration.

[ ] in installments to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration. During a period of probation or supervised release supervision payment of any unpaid balance shall be a condition of supervision and the U.S. probation officer shall establish and may periodically modify the payment schedule provided that the entire financial penalty is paid no later than the termination of supervision but in no event no later than 5 years after release from incarceration.

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

All financial penalty payments are to be made to the U.S. Courts National Fine Center except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 44

Criminal History Category: I

Imprisonment Range: LIFE

Supervised Release Range: A/L to 5 years

Fine Range: $ 25,000 to $ 6,000,000

[ ] Fine waived or below the guideline range because of the inability to pay.

Restitution: $

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[X] The sentence departs from the guideline range.

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following reason(s): A COMBINATION OF FACTORS AS FOLLOWS:

The defendant has actively been involved in verifiable legitimate business ventures since 1989. Additionally, the defendant has demonstrated exemplary behavior while on pretrial release, to include voluntarily appearing at the sentencing hearing in spite of facing life imprisonment.

The defendant is 35 years of age, and a sentence of 32 years as received is for all practical purposes a life sentence, but does give the defendant some hope for freedom in the late stages of his life. Additionally, a slight downward departure puts the defendant's sentence more in parity with other co-defendants who were engaged in the drug business with the defendant and for whom the government made motions for a downward departure, as they were sentenced to a similar 30 year sentence.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of 5 years from the date of sentencing in this matter.

[ ] ineligible for the following federal benefits for a period of _____.

(specify benefit(s)) _____

_____

_____

OR

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of _____.

[ ] be ineligible for the following federal benefits for a period of _____.

(specify benefit(s)) _____

_____

_____

[ ] successfully complete a drug testing and treatment program.

[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.
